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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK HURN
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER HURN'S SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE SEVENTH CIRCUIT AFFIRMED A SENTENCE BASED (IN ITS WORDS) "ALMOST ENTIRELY" ON ACQUITTED CONDUCT.

2. WHETHER HURN'S SENTENCE IS UNREASONABLE UNDER 18 U.S.C. § 3553(a), IN PART BECAUSE THE DISTRICT COURT APPLIED AN 18-LEVEL, 177-MONTH GUIDELINES ENHANCEMENT BASED ON ACQUITTED CONDUCT AND DID NOT GIVE ANY EFFECT TO HURN'S SEVERELY DIMINISHED MENTAL CAPACITY AND OTHER MITIGATING FACTORS.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark Hurn respectfully moves this Honorable Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, rendered on August 3, 2007, affirming a 210-month sentence for possession with intent to distribute powder cocaine.

OPINIONS BELOW

The August 3, 2007, decision of the United States Court of Appeals for the Seventh Circuit affirming the trial court's 210-month sentence, is reported at *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007), and appears in Petitioner's Appendix at A1 through A14.

The district court's September 29, 2006, unpublished Judgment appears in Petitioner's Appendix at B1 through B9.

The transcript of the district court's September 29, 2006, sentencing proceedings appears in Petitioner's Appendix at C1 through C39.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The opinion of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on August 3, 2007.

2. Petitioner invokes the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1) and Rule 10(c) of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition raises challenges under the Sixth Amendment of the United States Constitution, as well as issues relating to whether a sentence based almost entirely on acquitted conduct is reasonable under 18 U.S.C. § 3553(a).

U.S. CONST. amend. VI

In relevant part, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..."

18 U.S.C. § 3553(a)

(a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any

amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

The district court added nearly 15 years to Petitioner Mark Hurn's sentence based on conduct for which the jury had acquitted him. The Seventh Circuit affirmed the sentence based on its conclusion that this court's decision in *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633 (1997), permits a

sentencing court to consider conduct of which a defendant has been acquitted; thus, the district court's use of acquitted conduct did not violate Hurn's Sixth Amendment or due process rights. App. A8-A10.

In *United States v. Booker*, this court ruled that the Sixth Amendment bars a district court from increasing a sentence based on judge-made factual determinations that were not authorized by the jury's verdict. 543 U.S. 220, 125 S.Ct. 738 (2005) Even though the *Booker* decision expressly acknowledged that *Watts* did not consider Sixth Amendment implications of using acquitted conduct to increase a sentence, 543 U.S. at 240, the Seventh Circuit concluded that "*Watts* survived *Booker*" and therefore somehow controlled the Sixth Amendment analysis. App. A8-A10.

Review is necessary because the decision below appears to conflict with this court's recent Sixth Amendment jurisprudence and misapplies this court's decision in *Watts*.

A. District Court Proceedings

On June 22, 2005, a grand jury returned a two-count indictment charging Petitioner Mark Hurn with possessing fifty or more grams of crack cocaine with intent to distribute (Count I) and with possessing powder cocaine with intent to distribute, (Count II) in violation of 21 U.S.C. § 841(a). App. A2.

The record reflects that on June 2, 2005, police officers executed a search warrant at the Madison, Wisconsin home of Sabrina Mays, Hurn's girlfriend.

During the search, officers found crack cocaine, powder cocaine, ecstasy pills, and over $38,000 in cash throughout the home. Hurn initially stated that the drugs and money belonged to him, and showed the officers where some of the drugs and money were located in the house. *Id.* At trial, Hurn maintained that the drugs found at his girlfriend's home were not his and that he falsely confessed to the police because he was afraid that the real owners of the drugs would harm him or his girlfriend. Mays testified that a number of other individuals lived in her home, and that they were responsible for the drugs found there. App. A3.

After deliberating for over twelve hours, the jury found that Hurn was *not guilty* on Count I (possessing crack cocaine), but was guilty of possessing powder cocaine. App. B1.

The Sentencing Guidelines recommended a range of 27-33 months imprisonment based on the conviction for possessing powder cocaine. App. A4; App. C23-C24; U.S.S.G. § 2D1.1. However, the district court disregarded the jury's finding that Hurn was not guilty of possessing more than 50 grams of crack cocaine and found that Hurn possessed more than 450 grams of crack cocaine, increasing the Guideline recommendation 188 to 235 months. App. C15, C18-C19, C21, C33, U.S.S.G. § 2D1.1.

The district court imposed sentence "near the high end" of the enhanced range at 210 months imprisonment. App. C35. In so doing, the court gave full effect to the acquitted conduct, and while

acknowledging that Hurn's low intellectual capacity mitigated the crime, the district court declined to give any effect to Hurn's reduced culpability when imposing sentence. App. C35.

B. Appellate Proceedings

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the sentence. App. A14. In doing so, the court rejected Hurn's arguments that the consideration of acquitted conduct during sentencing violated his Sixth Amendment right to a jury, App. A8-A10, and that the resulting sentence was unreasonable, App. A10-A15, and affirmed on the grounds that "Hurn has not convinced us that his sentence is an exception to the general rule that a Guidelines sentence is reasonable." App. A14.

Hurn now petitions for review of this decision.

REASONS FOR GRANTING THE PETITION

Review should be granted because Petitioner Mark Hurn's sentence violates his Sixth Amendment right to a jury trial. Hurn's sentence of 210 months in prison was based "almost entirely" upon acquitted conduct. App. A9. The district judge's fact-findings concerning conduct for which Hurn was acquitted by a jury added 15 years to his sentence even though the Guideline range supported by the offense of conviction was only 27-33 months imprisonment. The jury considered and rejected the prosecution's accusation at trial that Hurn should be held criminally responsible for distribution of crack cocaine. Nevertheless, in disregard of that jury

finding and this court's pronouncements in a series of recent Sixth Amendment decisions, the district court imposed a sentence as if Hurn had been convicted of that charge. Such a sentence imposed based on judge-made findings that disregard the jury's findings is an incorrect application of the principles driving this court's recent Sixth Amendment jurisprudence.

The Seventh Circuit and several of the other circuits misconstrue this court's decision in *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633 (1997) to permit increasing a sentence based on acquitted conduct in the face of a Sixth Amendment challenge, in spite of this court's subsequent Sixth Amendment rulings in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005) and *Cunningham v. California*, 127 S.Ct. 856 (2007). Like the Seventh Circuit, most circuit courts have over-read *Watts* to conclude that the Sixth Amendment places no limit whatsoever on extreme acquitted conduct sentence enhancements. *See infra* Part 2. Certiorari is warranted to address and resolve the application of the Sixth Amendment in this context and also to rectify misunderstandings of this court's limited and narrow decision in *Watts*.

This case raises an important constitutional issue that is also before the court on a Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals in *Mercado v. United States*, U.S. Supreme

Court Docket No. 07-5810. The question presented in that petition is:

> Whether the Sixth Amendment prohibits a trial court from imposing a sentence based on conduct for which petitioner was acquitted by the jury.

As with Mercado's petition, review is necessary here because the decision below conflicts with this court's decisions regarding the proper application of the Sixth Amendment to sentencing of a criminal defendant. These petitions allow this court to directly address the constitutional limits of sentencing based on acquitted conduct.

In addition, beyond pure Sixth Amendment concerns, Hurn's 210-month sentence was unreasonable under 18 U.S.C. § 3553(a); the Seventh Circuit's affirmance of a sentence based "almost entirely" on acquitted conduct demonstrates that Courts of Appeals are in need of guidance on the standard of appellate review in light of principles announced by this court in *Rita v. United States*, 127 S.Ct. 2456 (2007).

1. The Seventh Circuit decision conflicts with this court's recent Sixth Amendment jurisprudence.

This court's recent Sixth Amendment jurisprudence dictates that a sentencing judge may

not abrogate the jury's role in determining a defendant's guilt. *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005); *Cunningham v. California*, 127 S.Ct. 856 (2007). Significantly and severely enhancing a sentence based on acquitted conduct beyond what an underlying conviction allows violates the terms, spirit and import of all of these recent decisions.

The Sixth Amendment guarantees all criminal defendants the right to a trial by jury. U.S. CONST. amend. VI. As this court has made clear in these recent decisions, the jury trial right safeguards the Framers' belief that "the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." *Apprendi*, 530 U.S. at 477 (2000) (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). Excessive reliance on acquitted conduct at sentencing robs defendants of their Sixth Amendment right to have "equals and neighbors" determine whether the Government should be permitted to punish the accused. *See id.*

This court's recent cases reveal why heavy reliance on acquitted conduct to justify an extreme sentence enhancement must be ruled unconstitutional in light of the inviolate right to a jury trial safeguarded by the Framers through the Sixth Amendment. This court has explained that a judge "exceeds his proper authority" in passing

sentence whenever "the jury has not found all the facts which the law makes essential to punishment." *Blakely*, 542 U.S. at 304, 124 S.Ct. 2531. Putting the same idea in different terms, this court declared that those sentences which expose a defendant to a greater punishment than that authorized by the jury's guilty verdict are unconstitutional under the Sixth Amendment. *Ring*, 536 U.S. at 609, 122 S.Ct. 2428. Facts other than prior convictions that "increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," and acquitted conduct, by definition, is that which the jury has explicitly *rejected* as having been proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 483, 120 S.Ct. 2348; *see also Jones*, 526 U.S. at 251-52, 119 S.Ct. 1215.

Most recently, in *Cunningham*, this court reiterated: "[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge." *Cunningham v. California*, 127 S.Ct. at 863-64. This court clarified that the greatest potential sentence is the maximum the court may impose "without any additional findings" by the sentencing judge. *Id.* at 860, quoting *Blakely*, 542 U.S. at 303-304, 124 S.Ct at 2531.

Here, the factual basis for imposition of a 177-month enhancement was the district court's findings that Hurn possessed 450 grams of crack cocaine in spite of the jury's finding that he did not. The findings of possession of crack cocaine were "not merely facts that the judge [found] relevant in

exercising his discretion," *Rita*, 127 S.Ct. at 2477, (Scalia, J. concurring); they were the essential predicate for the length of the punishment. The result is a sentence almost 530% higher than his conviction for powder cocaine authorized without additional fact-finding. Without these additional facts, the 210-month sentence would not be lawful, because it is an unreasonably excessive sentence for possession of powder cocaine. *See id.*. Moreover, notwithstanding the *Booker* remedy of rendering the Guidelines advisory, the imposition of a 210-month sentence violates the Sixth Amendment, because it would not have been upheld as reasonable on the facts encompassed by the jury verdict. *See Rita* 127 S. Ct. at 2462 (Scalia, J. concurring).

Even if this court concludes that consideration of acquitted conduct at sentencing is *sometimes* permissible under the Sixth Amendment, there must be constitutional (and statutory, *see infra* Part 2) limits to how extensively a district court can rely on acquitted conduct to increase a sentence on distinct charges. *See Rita*, 127 S. Ct. at 2462 (Scalia, J., concurring)("[T]he Court's opinion ... does not rule out as applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea.") This case presents this court with an important opportunity to explain the parameters of permissible consideration of acquitted conduct in post-*Booker* sentencing.

In *Cunningham*, this court took pains to explain that "*Booker*'s remedy for the Federal Guidelines . . . is not a recipe for rendering our Sixth

Amendment case law toothless." 127 S.Ct. at 870. But in this case the district court's heavy reliance on acquitted conduct does just that. In cases like this, a defendant's acquittal by a jury at trial is a Pyrrhic victory in many ways: not only has a judge declared guilt and imposed extra punishment without the traditional constitutional safeguards, but the defendant will often receive a sentence *longer* than if he had (falsely) admitted guilt to the charge on which he was acquitted.

Given the Framers' concerns about government power and the historic role of juries in limiting abuse of that power, *see Blakely*, 542 U.S. at 306, 124 S. Ct. 2531 (stressing the importance of juries "as circuitbreaker in the State's machinery of justice"); *see also Apprendi*, 530 U.S. at 501-18, 120 S.Ct. 2348 (Thomas, J., concurring) (reviewing common-law role of juries), the Constitution surely was not originally intended to afford federal judges unlimited discretionary authority to enhance sentences based on acquitted conduct. *Cf. Blakely*, 542 U.S. at 302 n.6, 124 S.Ct. 2531 (stressing that all the Justices recognize that the Constitution must place limits on judicial sentencing enhancements). Moreover, given Congress' concerns about unfettered judicial discretion and sentencing disparities, the Sentencing Reform Act of 1984 surely was not intended to afford federal judges unlimited discretionary authority to enhance sentences based on acquitted conduct. *Cf.* 18 U.S.C. § 3553(a)(6) (requiring judges at sentencing to consider "the need to avoid unwarranted sentence disparities among defendants with similar records *who have been found guilty* of similar conduct") (emphasis added).

Though perhaps not every consideration of acquitted conduct at sentencing raises grave constitutional concern, the fact that Hurn's lengthy sentence was, in the Seventh Circuit own words, based "almost entirely" upon acquitted conduct reveals the way in which federal prosecutors can continue to execute an end-run around the historically important principles emphasized by this court in its *Jones-Apprendi* line of cases. This court should grant certiorari to ensure that lower courts recognize proper constitutional limits on excessive reliance on acquitted conduct at sentencing. Otherwise the *Booker* remedy for the Federal Sentencing Guidelines renders the Sixth Amendment toothless.

2. The Seventh Circuit decision misapplied this court's holding in *United States v. Watts*.

This court's 1997 ruling in *Watts*, which permits some consideration of acquitted conduct at sentencing, and this court's subsequent Sixth Amendment rulings in *Jones*, *Apprendi*, *Ring*, *Blakely*, *Booker* and *Cunningham*, which prohibit increases in sentences based on facts not authorized by the verdict, have confused and divided lower courts concerning proper consideration of acquittals in post-*Booker* sentencing. This issue arises repeatedly in many district and circuit cases, and further guidance is needed from this court to ensure the uniform operation of the federal sentencing system.

A decade ago, when this court held that consideration of some acquitted conduct does not necessarily violate the Double Jeopardy Clause of the Fifth Amendment, *see Watts*, 519 U.S. at 148, 117 S.Ct. 633, the possibility of a Sixth Amendment violation "simply was not presented" to this court. *Booker*, 543 U.S. at 240, 125 S.Ct. 738. Indeed, as this court has recently clarified, *Watts* addressed only "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Id.* at 240 n.4, 125 S.Ct. 738; *see also Watts*, 519 U.S. at 171, 117 S.Ct. 633 (Kennedy, J., dissenting) (stressing the importance of the acquitted conduct issue and expressing concern about the majority's decision to issue a summary reversal without the benefits of full briefing).

Thus, this court has neither directly authorized nor directly rejected the consideration of acquitted conduct during sentencing when a Sixth Amendment claim is raised. As a result, lower courts have struggled with this issue in the wake of *Booker*, and this case presents an effective and justified setting to evaluate directly the constitutionality of a sentence based upon acquitted conduct.

Many district courts and numerous circuit judges have recently recognized this obvious tension between *Watts* and *Jones*, *Apprendi*, *Ring*, *Blakely*, *Booker* and *Cunningham*. *See United States v. Pimental*, 367 F.Supp.2d 143, 150 (D. Mass. 2005) (finding that *Booker* "substantially undermines the

continued vitality" of *Watts* "both by its logic and its words"); *United States v. Gray*, 362 F.Supp.2d 714, 721 (S.D. W. Va. 2005) (indicating that *Watts* "was drawn into serious question by the constitutional majority in *Booker*"); *United States v. Coleman*, 370 F.Supp.2d 661, 670 (S.D. Ohio 2005) (concluding that the "underlying premises of *Booker* and its predecessors—*Jones, Apprendi, Ring, and Blakely*—detract from *Watts'* continued validity."); *United States v. Ibanga*, 454 F.Supp.2d 532, 536 (E.D. Va. 2006) ("The continued validity of *Watts* and its progeny was recently called into question" by *Booker*); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1028 (D. Neb. 2005) ("[I]t can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proven beyond a reasonable doubt.").

Like the Seventh Circuit in this case, most circuit courts have over-read *Watts* to conclude that the Sixth Amendment places no limit whatsoever on acquitted conduct sentence enhancements. *E.g. United States v. Mercado*, 474 F.3d 654 (9th Cir. 2007); *United States v. Brika*, 487 F.3d 450 (6th Cir. 2007); *United States v. Horne*, 474 F.3d 1004, 1006-07 (7th Cir. 2007); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005); *United States v. Magallanez*, 408 F.3d 672, 683-85 (10th Cir. 2005); *United States v. Duncan*, 400F.3d 1297, 1304-05 (11th Cir. 2005). However, almost every major circuit ruling on this issue has included at least one opinion noting the uncertainty in the law after *Booker*. *See, e.g.*, *United States v. Grier*, 475 F.3d 556, 586 n.34 (3d Cir. 2007) (Ambro, Circuit J., concurring) (even if *Watts* "survives the Supreme Court's *Apprendi*

jurisprudence, the practice of considering acquitted conduct might not . . . [D]oing so might still violate the jury right of the Sixth Amendment as expounded by *Apprendi* and its progeny"); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, dissenting) (arguing that *Watts* focused solely on the Fifth Amendment and is inapplicable to Sixth Amendment challenges); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (suggesting that *Watts* has been "explicitly disavowed by the Supreme Court as a matter of Sixth Amendment law [and] has no bearing on this case in light of the Court's more recent and relevant rulings"); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, Circuit J., concurring) ("The oddity of all this is perhaps best highlighted by the fact that courts are still using acquitted conduct to increase sentences beyond what the defendant otherwise could have received—notwithstanding that five Justices in the *Booker* constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved *to a jury beyond a reasonable doubt.*").

Indeed, one Sixth Circuit panel has very recently indicated that all three members would "strongly recommend" *en banc* review of the "important question" of "whether the continuing use of acquitted conduct as a sentencing enhancement violates [*Booker*]" *United States v. White*, No. 05-6596 (6th Cir. Oct. 5, 2007). Though *White* is still being briefed to the Sixth Circuit, there is support in that court for a ruling that finds constitutional

problems with extensive reliance on acquitted conduct at federal sentencing. A ruling to that effect in *White* will create a circuit split and make tangible what has been apparent since *Booker*—namely that lower courts are uncertain and divided concerning possible constitutional limits on the consideration of acquitted conduct enhancements under the federal sentencing guidelines in light of the *Booker* remedy.

Certiorari is warranted to address and resolve the importance of the Sixth Amendment in this context and also to rectify misunderstandings of this court's limited and narrow decision in *Watts*. Given the complexities of this court's recent rulings, the struggles of lower courts to comprehend and apply them, and the constitutional importance of the issues presented, this case allows this court to evaluate and clarify whether the consideration of acquitted conduct during sentencing violates the Sixth Amendment, an issue which *Watts* concededly never addressed. *Booker*, 543 U.S. at 240, 125 S.Ct. 738.

3. The Seventh Circuit's excessive reliance on acquitted conduct is unreasonable under 18 U.S.C. § 3553(a).

Beyond the weighty Sixth Amendment concerns raised in this case, the Seventh Circuit's affirmance of Hurn's 210-month sentence was improper because his sentence is unreasonable under 18 U.S.C. § 3553(a). It was unreasonable under 18 U.S.C. § 3553(a) for the district court to use Hurn's conviction on possession and intent to distribute powder cocaine to sentence him as if he had been

convicted of the crack cocaine charges the jury had just rejected.

In *Booker*, this court declared the federal sentencing guidelines "effectively advisory" to remedy Sixth Amendment problems resulting from judicial fact-finding within a mandatory guideline system. 543 U.S. at 245, 125 S.Ct. 738. This ruling, which also recast appellate review of sentences, now requires that both initial sentencing determinations and sentencing appeals be governed by the provisions of 18 U.S.C. § 3553(a). As *Booker* explains, "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." 543 U.S. at 262, 125 S. Ct. at 766.

Hurn's sentence was unreasonable because it relies so heavily on acquitted conduct even though 18 U.S.C. 3553(a) repeatedly instructs judges to consider matters related to "the offense," which plainly refers to the offense *of conviction* and implicitly excludes acquitted charges. *See* 18 U.S.C. § 3553(a) (instructing judge to consider "the nature and circumstances of the offense"); *id.* § 3553(a)(2)(A) (instructing judge to consider the need for the sentence to "reflect the seriousness of the offense" and to "provide just punishment for the offense"); *id.* § 3553(a)(4)(A) (instructing judge to consider guideline sentences and ranges for "the applicable category of offense"); *id.* § 3553(a)(7) (instructing judge to consider need for restitution for "any victims of the offense"). The language and structure of Section 3553(a) indicate that heavy reliance on

alleged conduct related to acquitted charges, rather than on conduct relating to "the offense" of conviction, is contrary to Congress instructions to sentencing judges in the Sentencing Reform Act. *Cf. United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (concluding that reference to "the offense" in § 3553(a)(2)(A) concerns "the offense of conviction").

Similarly, the plain text of § 3553(a)(6) requires district judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who *have been found guilty* of similar conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). Through the enacted text of 3553(a), Congress has indicated that judges should be concerned at sentencing with conduct for which a defendant has "been found guilty," which in turn spotlights the unreasonableness of excessive reliance at sentencing on conduct for which a defendant has been found not guilty. This plain text suggests that a district court's reliance on acquitted conduct constitutes consideration of an "improper factor," rendering Hurn's sentence unreasonable.

Section 3553(a)(2)(A) provides that a judge must consider "the need for the sentence imposed . . . to promote respect for the law." Tellingly, lower courts have recognized that, given this court's Sixth Amendment jurisprudence, heavy reliance on acquitted conduct to enhance sentences will necessarily promote *disrespect* for the law. *See, e.g., Coleman*, 370 F. Supp. 2d. at 671 n.14 (noting that a "layperson would undoubtedly be revolted by the idea that, for example, a person's sentence for crimes of which he has been convicted may be multiplied

fourfold by taking into account conduct of which he has been acquitted.") (quotation marks omitted); *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (calling acquitted conduct rulings a "jurisprudence reminiscent of *Alice in Wonderland* . . . . As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"). Hurn's sentence is necessarily unreasonable because it promotes *disrespect* for the law in contravention of both Section 3553(a)(2)(A) and the jury trial rights and traditions embraced by the Constitution.

Finally, in *Rita*, this court recognized the potential force of arguments that the Guidelines "do not generally treat certain defendant characteristics in the proper way," 127 S.Ct. at 2468, and in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). this court stressed the "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." 536 U.S. at 316, 122 S.Ct. 2242. Because the Guidelines do not reflect or incorporate in any way the diminished culpability of mentally impaired offenders like Hurn, it is the responsibility of district courts to give proper consideration to mental impairments as part of its obligation under § 3553(a)(1) to consider the "history and characteristics" of the defendant. In this case, the district court unreasonably failed to accord any functional significance to Hurn's mental retardation, even after conceding that Hurn's low IQ "does mitigate the crime." App. C35.

In short, this court has already noted the existence of constitutional limits on a trial judge's

discretion to increase a defendant's sentence based on acquitted conduct, and the distinctive facts of this case strongly dictate that these limits have been exceeded. *See Watts*, 519 U.S. at 156, 117 S. Ct. at 637 (discussing potential constitutional implications of uncharged conduct that dramatically increases a defendant's sentence).

CONCLUSION

The United States Court of Appeals for the Seventh Circuit, in affirming Hurn's 210-month sentence, allowed the trial court's consideration of acquitted conduct to increase Hurn's otherwise applicable guideline maximum sentence by 177 months. This court should issue the prayed-for writ, vacate the sentence, and reverse and remand this case with appropriate instructions to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted this 1st day of November, 2007.

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APPENDIX INDEX

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In the United States Court of Appeals
For the Seventh Circuit

No. 06-3666

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK HURN,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 05-CR-0085—**John C. Shabaz**, *Judge.*

ARGUED JUNE 8, 2007—
DECIDED AUGUST 3, 2007

Before POSNER, FLAUM, and MANION,
Circuit Judges.

FLAUM, *Circuit Judge.* After a two day trial, a jury acquitted Mark Hurn of possession of cocaine base with intent to distribute, but found him guilty of possession of powder cocaine with intent to distribute. At sentencing, the district court found that Hurn distributed cocaine base, notwithstanding

the jury's acquittal on that count, and calculated a Guidelines range of 188 to 235 months in prison. Though Hurn argued that his I.Q. of between fifty and sixty-four merited a much lower sentence, the district court sentenced him to 210 months imprisonment. Hurn appeals his conviction and sentence. For the following reasons, we affirm.

I. Background

On June 2, 2005, officers from the Dane County Narcotics and Gangs Task Force executed a search warrant at Hurn's home in Madison, Wisconsin. The officers found over 450 grams of cocaine base, approximately fifty grams of powder cocaine, ecstasy pills, and over $38,000 in cash throughout the home. Hurn admitted that he was a drug dealer and that the drugs and money belonged to him. He also showed the officers where some of the drugs and money were located.

On June 22, 2005, a grand jury returned a two-count indictment. Count One charged Hurn with possessing fifty or more grams of cocaine base with intent to distribute and Count Two charged him with possessing cocaine with intent to distribute, both counts in violation of 21 U.S.C. § 841(a).

Before trial, the government advised Hurn that it planned to use a 1995 drug conviction to prove his intent and lack of mistake.[1] Hurn argued that

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[1] Hurn was sentenced to five years in prison for this conviction.

the admission of his prior conviction would violate Federal Rule of Evidence 404(b), but the district court ruled that the evidence was admissible.

At trial, Hurn maintained that the drugs were not his and that he falsely confessed to police because he was afraid that the real owners of the drugs would harm him. His live-in girlfriend, Sabrina Mays, testified that she allowed a number of other individuals to live in the home from time to time and that they were responsible for the drugs found there. The government argued that Hurn's defense was not credible, pointing to his post-arrest admissions and lack of legitimate employment during the relevant time period. The district court admitted Hurn's prior conviction over his continued objection, but instructed the jury that the conviction should be considered only as evidence of Hurn's intent. Ultimately, the jury acquitted Hurn on Count One (cocaine base), but convicted him on Count Two (powder cocaine).

The probation office prepared a presentence report (PSR), and concluded that, despite the verdict, a preponderance of the evidence demonstrated that Hurn possessed with intent to distribute both cocaine powder and cocaine base. As a result, it advised the district court to consider Hurn's possession of cocaine base when determining Hurn's relevant conduct under Federal Sentencing Guideline § 1B1.3. The PSR recommended a base offense level of 34, a criminal history category of III, and a Guidelines range of 188 to 235 months. Had the PSR not included Hurn's possession of cocaine

base in its relevant conduct calculation, Hurn's recommended Guidelines range would have been 27-33 months.

At sentencing, Hurn objected to the consideration of acquitted conduct and argued that his low intellectual capacity merited a sentence at the low end of the 27-33 month Guidelines range. The court rejected Hurn's plea for leniency, noting that he made the same sentencing argument after a previous drug conviction:

> The present offense is remarkably similar to the 199[5] crack distribution case that you had before Judge Fielder. It's a rerun where he admonished you and addressed the issue of diminished capacity. Even back then the court took note that you had been making a living as a drug dealer[,] and despite your cognitive disabilities you successfully amassed large sums of money. We do not entirely discount your intellectual impairments as a factor. It does mitigate the crime. But nonetheless, you were in there with your eyes wide open[,] and it is now time for sentencing.

Sent. Trans. at 33-34. The district court also concluded that the government proved by "clear and convincing evidence" that Hurn personally possessed

cocaine base with intent to distribute. It then sentenced him to 210 months in prison.

II. Analysis

A. Rule 404(b) Evidence

Hurn's first argument concerns the district court's admission of his 1995 conviction. Though the district court ruled that the conviction was relevant to prove intent, Hurn claims that the conviction only demonstrated his propensity to deal drugs, a prohibited purpose under Rule 404(b). We review the district court's admission of evidence under Rule 404(b) for an abuse of discretion. *See United States v. Senffner*, 280 F.3d 755, 762 (7th Cir. 2002). We give the district court great deference in such matters, and we will not substitute our judgment for that of the district court. *Id.*

Rule 404(b) prohibits the government from using prior bad acts "to prove the character of a person in order to show action in conformity therewith," but allows the admission of such evidence to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This Court evaluates the admissibility of prior bad acts under a four part test. The evidence must be relevant to an issue other than the defendant's propensity to commit the crime charged, the other act must be similar enough and close enough in time to be relevant, there must be sufficient evidence that the defendant committed the similar act, and the probative value of the evidence

must not be substantially outweighed by the danger of unfair prejudice. *See United States v. Puckett*, 405 F.3d 589, 596 (7th Cir. 2005).

This Court has recognized several situations in which a prior drug conviction is relevant to prove the defendant's intent in a subsequent prosecution for possession of drugs with intent to distribute. The most obvious situation is the one "in which the defendant, while admitting possession of the substance, denies the intent to distribute it." *United States v. Jones*, 455 F.3d 800, 808 (7th Cir. 2006). A prior conviction is also relevant when the defendant concedes being in the vicinity of drug activity but argues that he was a "clueless bystander." *See United States v. Chavis*, 429 F.3d 662, 668 (7th Cir. 2005); *United States v. Macedo*, 406 F.3d 778, 793 (7th Cir. 2005). In *Chavis*, the defendant was caught buying cocaine base from a drug dealer, but claimed that he "was simply in the wrong place at the wrong time." We held that the defendant's prior drug conviction was admissible to prove intent. *Chavis*, 429 F.3d at 668. In *Macedo*, the defendant was arrested at O'Hare airport after he met two Mexican nationals who had attempted to smuggle methamphetamine into the country. At trial, he claimed that he had nothing to do with the drug conspiracy and was at the airport "by happenstance." We held that a nine-year-old drug conviction was admissible to prove intent. *Macedo*, 406 F.3d at 793.

In this case, Hurn conceded in his closing argument that he knew there were cash and drugs in the home, but maintained that he did not know how

much cash or what kind of drugs were there because none of it was his. He maintained that he stayed in the home only occasionally and that he falsely confessed to owning the drugs because he was afraid of retaliation by the real drug dealers. Just like the defendants in *Chavis* and *Macedo*, Hurn claimed that he was an innocent bystander who was in the wrong place at the wrong time. Accordingly, the prior conviction was relevant on the issue of Hurn's intent.

Hurn also maintains that the 1995 conviction was too remote to be relevant and that its unfair prejudice substantially outweighed its probative value. We have held that a district court does not abuse its discretion by admitting thirteen-year-old evidence of prior bad acts where the prior conduct is very similar to the conduct charged. *See United States v. Wimberly*, 60 F.3d 281, 285 (7th Cir. 1995); *see also Macedo*, 406 F.3d at 793 (holding that the admission of Rule 404(b) evidence is proper in a drug case where nine years elapse between the prior conduct and the conduct charged). *Cf. United States v. Garcia*, 291 F.3d 127, 138-39 (2d Cir. 2002) (holding that a district court errs by admitting a twelve-year-old drug conviction to prove intent in a subsequent drug prosecution). Here, Hurn's previous conviction involved conduct that was very similar to the conduct charged. In both instances, Hurn was caught distributing large quantities of cocaine while in possession of significant amounts of cash. Consequently, his ten-year-old conviction was not too remote to be used at trial.

Additionally, the prior conviction's probative value was not substantially outweighed by unfair prejudice. Importantly, the district court instructed the jury to consider the prior conviction only as evidence of intent, "and we must presume that the jurors followed this order." *Chavis*, 429 F.3d 668-69. Moreover, the conviction was highly probative because it went directly to Hurn's intent to distribute cocaine, which he "made an issue in the case by denying any connection to the drugs." *Id.* at 669.

B. Relevant Conduct

Hurn next argues that the district court violated his Sixth Amendment and due process rights by using acquitted conduct to enhance his sentence. The Supreme Court, in *United States v. Watts*, 519 U.S. 148, 154 (1997), held that when calculating a defendant's relevant conduct under section 1B1.3 of the Federal Sentencing Guidelines, "a sentencing court may consider conduct of which a defendant has been acquitted." The Court noted that "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *Id.* at 156 (internal quotation omitted). Hurn, citing several district court decisions, contends that *United States v. Booker*, 543 U.S. 220 (2005), overruled *Watts*. This Court has held, however, that *Watts* survived *Booker*, and we decline to reconsider our position. *See United States v. Horne*, 474 F.3d 1004, 1006 (7th Cir. 2007); *United States v. Price*, 418 F.3d 771, 788 & n.7 (7th Cir. 2005).

Watts acknowledged that there is some disagreement among circuit courts about whether a sentence, like this one, that is based "almost entirely" on acquitted conduct, violates due process when the district court applies a preponderance of the evidence standard rather than requiring clear and convincing evidence. *Compare, e.g., United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (requiring clear and convincing proof where the use of acquitted conduct results in a seven-level adjustment to the defendant's Guidelines range), *with United States v. Ward*, 190 F.3d 483, 492 (6th Cir. 1999) (holding that a district court may find acquitted conduct by a preponderance of the evidence). Nevertheless, the disagreement—which *Watts* did not resolve—is not relevant in this case, because the district court applied the higher standard of proof when determining that Hurn committed the conduct in question. Moreover, the evidence at trial and sentencing amply supported the district court's finding. Putting aside the numerous admissions that Hurn made to police immediately after his arrest as well as the physical evidence uncovered during the search, Hurn acknowledged that the district court could conclude that he allowed others to store cocaine in his home.[2] An individual

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[2] In a letter written to the district court prior to sentencing, Hurn's attorney wrote, "At the most, Mark was a dupe who allowed his 'friends' to use his and [Mays]'s home to store the materials." Hurn's attorney made this concession even though the district court instructed the jury to convict Hurn if he knowingly aided or abetted another's commission of the crime.

can be held criminally responsible for distributing drugs if he allows others to store drugs in his home for that purpose. *See United States v. Jenkins*, 78 F.3d 1283, 1287 (8th Cir. 1996); *United States v. Smith*, 26 F.3d 739, 748 (7th Cir. 1994).

Because clear and convincing evidence supported the district court's finding that Hurn possessed cocaine base with intent to distribute, the district court's use of acquitted conduct did not violate Hurn's Sixth Amendment or due process rights.

C. The § 3553(a) Factors and Reasonableness

Lastly, Hurn argues that his sentence should be vacated for two reasons that the Supreme Court recently discussed in *Rita v. United States,* 127 S. Ct. 2456, 2462 (2007). He argues that the district court did not adequately consider the sentencing factors outlined in 18 U.S.C. § 3553(a) and that his sentence is substantively unreasonable because it gives insufficient weight to his diminished mental capacity. We address each argument in turn.

1. Consideration of § 3553(a) Factors

In *Rita*, the Supreme Court discussed what and how much a sentencing judge must state on the record to demonstrate that it considered the § 3553(a) factors. 127 S. Ct. at 2468-69. Ultimately, the Court concluded that the judge need not say a great deal. In *Rita*, the defendant was convicted of perjury and requested a sentence below the applicable Guidelines range. He argued that because

he was a former government criminal justice employee, other inmates were likely to retaliate against him. He also maintained that his poor physical health and former military service weighed in favor of leniency. The government responded that a former criminal justice employee should have known better than to interfere with a federal investigation. The sentencing judge asked the parties questions about each sentencing factor, and after hearing the parties' arguments, decided that the defendant's Guidelines range provided an appropriate sentence that would protect the public from the defendant's crime. He then sentenced the defendant to the bottom of the Guidelines range.

Though the sentencing judge did not mention the defendant's reasons for leniency, the Supreme Court held that his statement demonstrated that "he ha[d] considered the parties' arguments and ha[d] a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 2468. The Court said that the judge listened to the defendant's arguments and "simply found these circumstances insufficient to warrant a sentence lower than the Guidelines range." *Id.* at 2469. It further explained that although the judge could have elaborated that "he had heard and considered the evidence and argument," that the Sentencing Guidelines reflected a proper sentence, and that the defendant's "personal circumstances here were simply not different enough to warrant a different sentence," the context of the judge's statements made his reasoning clear and allowed the Court to review that reasoning on appeal. *Id.*

The district court in this case said substantially more than the judge in *Rita*. After listening to Hurn's two arguments for leniency—his limited role in the offense and his diminished mental capacity—the district court provided reasons for rejecting them. As a factual matter, the court concluded that Hurn was not a minor player in the offense, *see* Sent. Tr. at 33. Addressing Hurn's second argument, the district court read into the record the sentencing transcript from Hurn's 1995 drug conviction. In that case, the state court judge discussed the very same issue of limited mental capacity:

> Mr. Hurn, I realize you have had some inherent difficulties in your life that are beyond your control, by that I mean the fact that you are developmentally disabled. That came through very clearly in the presentence investigation report . . . . I'm satisfied that you are of sufficient mental ability to know that dealing in drugs is wrong and that people who do so are going to be punished, oftentimes punished harshly, because this is something that society is simply not going to tolerate. Regardless of your degree of educability, I am further satisfied that that [sic] you are aware that someone holding 50 or approximately 50 pieces of crack cocaine and having on their persons three separate wads of money

> which totaled up to $3700 is someone who is involved in the drug trade . . . . And I'm satisfied that you were in there with your eyes open, that you knew the potential penalties you faced.

Sent. Tr. at 32-33. The district court stated that this case was "remarkably similar" to the 1995 drug conviction and that despite the state court judge's prior admonitions, Hurn had returned to a life of dealing drugs. *Id.* at 33. In other words, the court discounted Hurn's limited mental capacity argument because he was fully aware that dealing drugs could lead to serious consequences, particularly after his stint in prison.

The Court then recited the § 3553(a) factors, noting that an important consideration would be how to fashion a sentence that "would somehow deter [Hurn] from [his] continued criminal activity." *Id.* It also repeated the importance of Hurn's criminal history, noted his history of alcohol and drug abuse, and pointed out that Hurn's drug quantities were at the top of the drug quantity range. In short, the district court addressed Hurn's arguments in favor of leniency, discussed the § 3553(a) factors that it found most important, and ultimately settled on a sentence in the middle of the Guidelines range. As a result, it sufficiently articulated the reasons for Hurn's sentence.

2. Reasonableness

Hurn also argues that the length of his sentence is unreasonable because the district court gave insufficient weight to his limited mental capacity. A Guidelines sentence is presumptively reasonable, *see Rita,* 127 S. Ct. at 2462, "and we review the district court's decision deferentially." *United States v. Otero*, No. 05-3132, 2007 WL 2050403, at *6 (7th Cir. July 19, 2007). Hurn has not convinced us that his sentence is an exception to the general rule that a Guidelines sentence is reasonable. The district court reasonably concluded that, despite Hurn's low I.Q., he knew that he was engaging in serious criminal activity and that—given the prior conviction for the same offense—a Guidelines range sentence was necessary to deter him from further criminal behavior.

III. Conclusion

For the foregoing reasons, we AFFIRM Hurn's conviction and sentence.

United States District Court
Western District of Wisconsin

UNITED STATES OF AMERICA
v.
MARK HURN

JUDGMENT IN A CRIMINAL CASE
(for offenses committed on or after
November 1, 1987)

Case Number: 05-CR-085-S-01

Defendant's Attorney: Mark Eisenberg

The defendant Mark Hurn was found guilty on count 2 of the indictment.

The defendant was acquitted on count 1 of the indictment.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	**Nature of Offense**
21 U.S.C. § 841(a)(1)	Possession with Intent to Distribute Cocaine, a Schedule II Controlled Substance; a Class C Felony

Date Offense Concluded	**Count Number(s)**
June 3, 2006	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Date of Birth: September 22, 1972

Defendant's USM No.: 10599-045

Defendant's Residence Address:
c/o Annie Hurn
1425 West 72nd Street
Chicago, IL 60636

Defendant's Mailing Address:
c/o Dane County Jail
115 West Doty Street
Madison, WI 53703

September 29, 2006
Date of Imposition of Judgment

s/John C. Shabaz
JOHN C. SHABAZ

September 29, 2006
Date Signed:

IMPRISONMENT

Defendant is committed to the custody of the United States Bureau of Prisons for imprisonment for a period of 210 months.

The Court recommends that the defendant be afforded the opportunity to apply for vocation training and a substance abuse treatment program while confined which does not include an early release.

It is further recommended that the defendant be afforded a prerelease placement in a residential reentry center with work release privileges but without home confinement during the final months of his confinement.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment

_____

UNITED STATES MARSHAL

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, defendant shall be on supervised release for a term of three years.

Defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If defendant has been convicted of a felony, defendant shall not possess a firearm, destructive

device, or other dangerous weapon while on supervised release.

Defendant shall cooperate with the collection of DNA by the U.S. Justice Department and/or the U.S. Probation and Pretrial Services Office as required by Public Law 108-405.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page).

Defendant shall also comply with the following special conditions:

1. Provide the supervising U.S. probation officer any and all requested financial information;

2. Register with local law enforcement agencies and the state attorney general as directed by the supervising U.S. probation officer.

3. Submit his person, residence, office or vehicle to a search conducted by a U.S. probation officer at a reasonable time and in a reasonable manner whenever the probation officer has reasonable suspicion of contraband or of the violation of a condition of release;

failure to submit to a search may be a ground for revocation; defendant shall advise any other residents that the premises he is occupying may be subject to searches pursuant to this condition;

4. Abstain from the use of illegal drugs and from association with drug users and sellers and participate in substance abuse treatment. The defendant shall submit to drug testing beginning within 15 days of release and 60 drug tests annually thereafter. The probation office may utilize the Administrative Office of the U.S. Courts' phased collection process; and

5. Pay child support in accordance with any applicable court order.

STANDARD CONDITIONS OF SUPERVISION

1) Defendant shall not leave the judicial district without the permission of the court or probation officer;

2) Defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) Defendant shall support his or her dependents and meet other family responsibilities;

5) Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) Defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

7) Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of any contraband observed in plain view by the probation officer;

10) Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

Count	Assessment	Fine	Restitution
	$100.00	$0.00	$0.00
Total	$100.00	$0.00	$0.00

Pursuant to 18 U.S.C. § 3013, defendant is ordered to pay a criminal assessment in the amount of $100.00. The criminal assessment is to be paid immediately to the Clerk of Court for the Western District of Wisconsin.

The defendant has neither the present means nor the earning capacity to pay a fine under § 5E1.2(c) without impairing his ability to support himself and his dependents upon release.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

(1) assessment;
(2) restitution;
(3) fine principal;
(4) cost of prosecution;
(5) interest;
(6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a period of imprisonment, payment of monetary penalties shall be due during the period of imprisonment.

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
* *

UNITED STATES OF AMERICA,
Plaintiff,

vs. Case No. 05-CR-0085-S-01

MARK HURN, Madison, Wisconsin
September 29, 2006

Defendant. 1:45 p.m.
* *

TRANSCRIPT OF SENTENCING
HELD BEFORE THE HONORABLE JOHN C. SHABAZ
APPEARANCES:

For the Plaintiff: Office of the United States Attorr
BY: MEREDITH P. DUCHEMIN
Assistant United States Attorney
Suite 200, City Station
660 West Washington Avenue
P.O. Box 1585
Madison, WI 53701-1585

For the Defendant: Eisenberg Law Offices, S.C.
BY: MARK EISENBERG
P.O. Box 1069
Madison, WI 53701

Also Present: Mark Hurn, Defendant

Court Recorder: Vivian Balderas
120 North Henry Street, Room 32
Madison, WI 53703

Transcription Service:S-B Transcription Service
5212 East Lacy Road
Fitchburg, WI 53711

Proceedings recorded by electronic sound recording, transcript produced by certified transcription service.

[1]

(Call to Order of the Court)

THE CLERK: Case No. 06 -- I'm sorry -- 05-CR-85-S, United States of America versus Mark Hurn. Court is called for a sentencing. May we have the appearances, please?

MS. DUCHEMIN: Good afternoon again, Your Honor. Meredith Duchemin appears on behalf of the United States.

MR. EISENBERG: Mark Hurn in person and by Attorney Mark Eisenberg.

THE COURT: Mr. Hurn, the Court has examined a number of documents in this matter to include the trial record and the testimony provided by the witnesses. The Court has also reviewed the presentence report prepared on August 30th of this year, also the letter from Ms. Duchemin advising that the United States has no objections to the report, the letter that your attorney has submitted objecting to portions of the report, the addendum to the presentence report which addresses those objections, the response provided in this matter by your attorney on September 28th as it concerns those same objections in the memorandum for sentencing, as well as the United States' sentencing memorandum.

The Court has examined those documents and at this time asks, Mr. Hurn, if you have read those documents.

DEFENDANT HURN: Is this on?

THE COURT: Yes, sir.

DEFENDANT HURN: Yes, sir.

[2]

THE COURT: And have you discussed them with your attorney?

DEFENDANT HURN: Yes, sir.

THE COURT: And, Mr. Eisenberg, are there other objections other than those which you have brought to the Court's attention?

MR. EISENBERG: No, sir.

THE COURT: Ms. Duchemin, any additional objections that you may have as it relates to the documents to which the Court has referred?

MS. DUCHEMIN: Your Honor, the United States has no further objections.

THE COURT: The Court then places the documents referred to in the record under seal with the understanding that in the event of appeal, counsel on appeal are provided access to these documents except where there may be a sentencing recommendation and that sentencing recommendation is not available to the public or the parties, it being a private document. The Court has examined the record as well as the testimony of several of the witnesses and that is the only information that it uses to base its sentence upon other than these three books of law which counsel have been referring to throughout the presentence -- strike that -- the investigation and pending sentencing in this case.

The Court would suppose that it would be

[3]

oversimplification to suggest that the issues relate to relevant conduct and acceptance of responsibility, so certainly I would expect to hear those additional comments that you wish to bring to the Court's attention relating to those fields of objection and those other objections which you also believe that you'll want the Court to consider. Mr. Eisenberg.

MR. EISENBERG: Thank you, Judge.

THE COURT: Wait a minute, I think I got that reversed.

MR. EISENBERG: Okay.

THE COURT: The burden is on the government.

MS. DUCHEMIN: Yes, Your Honor. Your Honor, I'm going to discuss the issue of relevant conduct. In my sentencing memorandum I submitted some thoughts on acceptance of responsibility. I have nothing to add with regard to acceptance of responsibility.

But on the issue of relevant conduct, obviously the issue is set forth in detail in the presentence report and in the addendum. It's discussed at length in the defendant's submissions. I agree with the analysis of the United States probation officer that the defendant's relevant conduct should include the crack cocaine found in the Nike shoebox in the closet. The law in the Seventh Circuit is clear, that even conduct that defendant

was acquitted of at trial can be relevant conduct as long as the government proves the

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underlying conduct by a preponderance of the evidence.

Now the defendant -- excuse me -- most recently cited a case from the Ninth Circuit that says the standard should be clear and convincing evidence. I've reviewed that case. It appears from the case that that's actually been the standard in the Seventh Circuit in this type of -- or, excuse me -- in the Ninth Circuit in this type of situation since 1991 and the issue in that case was only whether that same standard survived Booker and the court held that it did. But the fact of the matter is, that case is in the Ninth Circuit and it's not the law of the Seventh Circuit. In this circuit the law is by a preponderance of the evidence.

The Court's already indicated it's reviewed the transcript. You know, the Court obviously was here. I'm not going to go into a huge list of facts. You've heard the facts. They're also noted in detail in the PSR. But I submit that the evidence meets the preponderance standard. Even if the Court's inclined to use a higher standard of clear and convincing evidence, I believe it certainly meets that standard as well.

I do have some thoughts with respect to Sabrina Mays and her testimony on this issue. Ms. Mays is an admitted liar. We certainly discussed the lies that she has told. She testified

that the drugs and the money were brought into the apartment by others. She discovered them, told them to get the stuff out of the apartment, but then these folks must have planted the drugs

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and the money in the apartment in places like her underwear drawer because she never saw them again until the police got there.

Interestingly, though, she never provided any evidence about how it was that Mr. Hurn knew the stuff was there. Recognizing this, Mr. Eisenberg asked the jury to infer during closing argument that the real owner of the stuff must have shown Mark where it was at some point before the police got there and that Hurn for some reason showed them where the stuff was and then falsely confessed to protect the real drug dealer.

In his most recent letter to the Court, Hurn again argues -- this is on page 2 of the most recent letter at the end of the second paragraph -- quote, we are not indicating that he did not understand that large quantities of drugs and money were in the house. We believe that other people involved were the ringleaders. At most, Mark was a dupe who allowed his friends to use his and Sabrina's home to store the materials.

Your Honor, in my opinion this is not a proper objection to the crack being included as relevant conduct. It's an admission that it should be. Even taking him at his word that this is how it happened, he aided and abetted the person who put the drugs in

the house. He's a party to the crime. He gave them a place to store it and hide it. Those drugs are part of his relevant conduct. And again, this is taking him at his word that he's the patsy and not the real drug dealer.

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The quantities stored in the apartment were reasonably foreseeable to him. We know that because they were actually foreseeable to him. He knew where they were. So even taking this patsy defense as true, I believe this is really more of an issue for the Court to consider under 3553 and not under the guidelines.

With respect to the defendant's arguments that the relevant conduct violates his due process rights, this issue has been litigated and argued by defense attorneys since the beginning of the concept of relevant conduct and it's an argument that has been continually rejected by the courts.

For all these reasons, Your Honor, and those set forth in the PSR and the addendum, we would ask that the Court dismiss the defendant's objection and find that the defendant's relevant conduct is that set forth in the presentence report.

THE COURT: Mr. Eisenberg.

MR. EISENBERG: I don't think it's my job to have to relitigate what's already been litigated and found by the jury that Mark Hurn was not guilty of selling crack cocaine.

I think the issue is can this Court or does this

Court have to--not can it--does this Court have to sentence him based on acquitted conduct. And obviously the Watts decision talked about it's discretionary with this Court, you don't have to do that. I suppose you can if you want to, but to me that's offensive. It throws out what our jury, what our jury system

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is all about.

I try to think about this as putting someone that we know in that position and that person comes in and says, Geez, I just got acquitted of this but I'm going to get sentenced on it anyway. And I think if you took a vote on the street of people who were posed that question, 99 percent of them would say that's not right. And it's not right.

THE COURT: That's why we've got a government of laws rather than of men.

MR. EISENBERG: But the law is discretionary and it's still not right. And, Judge, you know that Watts, in all my summations Watts didn't really address this issue and a number of district courts have you said, You know what? That's not right. That's not fair. I'm not going to do that.

I tried to take this one step further and think about, okay, let's assume he would have been acquitted of the powder cocaine as well. Could you then say, Well, wait a minute, he got acquitted on both of these by a reasonable doubt but I'll take the preponderance of the evidence standard and I'm not going to let him out and I'm going to sentence him

anyway. Well, of course you couldn't do that. So why should you be able to do it on the other one? The whole reasoning doesn't make any sense.

This is different than -- I saw the last case you had where there was a plea of guilty and it was just determining

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how much weight there was. That's a little different determining the crack. And I understand the relevant conduct argument and, you're right, it's been around for a long time and I'm not here to change the law. I'm just saying I don't think it's right and I don't think -- I think it's personally offensive when it ruins the whole jury system.

They get a crack at the trial, they lose at the trial, they come back and say, Oh, by the way, we lost at the trial but sentence him anyway. And to come in here and now try to discredit Sabrina saying, well, she lied about this and she lied about that. Well, the jury didn't obviously think all that. I don't know what the jury said because obviously in this circuit you -- or district you can't call them anyway. But I think this would have been an interesting case to make that one determination.

The last thing that really bothered me in this case was if he is this big drug dealer and the informant -- if you will recall, Judge, the informant said something like he had been bringing up three or four kilos every two weeks I think it was from Chicago and they had known this information for eight months or nine months before they actually did

the search warrant. Why didn't they set this man up? Why didn't they go do that like they do with every other case that we have here? I don't know. They got the search warrant instead and they found the drugs. But it makes more sense to me if they would

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have caught him in the act and they never really did.

I don't think this is right. I've said this in all my memos. I don't really have anything else to say other than I think you should sentence him based on what he was convicted of, which was the powder cocaine, and that's I think 27 to 33 months for the guidelines.

I don't have any other comments on the acceptance of responsibility either, but it seems to me that if you're going to sentence him based on those guidelines with the crack cocaine, he was found not guilty of that, maybe he should get acceptance for that. Again, I think that's discretionary on your part as well. Thank you.

THE COURT: Any reply?

MS. DUCHEMIN: No. As I stated, my argument on acceptance of responsibility is already set forth in the government's submissions.

THE COURT: Well, you know, this was in effect long before the guidelines and the guidelines has not suggested anything to the contrary. I think that the United States Supreme Court is a little

better authority than the man on the street, Counsel.

At page 155 in the Watts case: An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without

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specific jury findings, no one can logically or realistically draw any factual finding inferences. Thus, contrary to the Court of Appeals' assertion in Brady, the jury cannot be said to have necessarily rejected any facts when it returns the general verdict of not guilty. For these reasons, an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. The guidelines state that it is appropriate that facts relevant to sentencing be proved by a preponderance of the evidence.

Now regardless of what you may think to the contrary, that's what the guidelines state, that it is appropriate that the facts relevant to sentencing be proved by a preponderance of the evidence, and we have held that application of the preponderance standard at sentencing generally satisfies due process, acknowledging a divergence of opinion among the Circuits. The cases before the court in Watts did not present such exceptional circumstances and the court did not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge

so long as that conduct has been proved by a preponderance of the evidence.

The court then discusses with us where it may be that some other standard might be appropriate, and you've got two Seventh

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Circuit cases. You don't have to go out to California. You have two Seventh Circuit cases which have addressed the matter as well. The verdict does not preclude a finding by a preponderance of the evidence that the defendant did in fact use or carry such a weapon--that again is Watts--and did indeed in this instance possess cocaine base for the purposes of distribution. That is what can be found by a preponderance of the evidence.

There are the exceptions and I'll get to that. Before, however, getting to that, I'm indicating to you that I'm accepting the unobjected to, those findings of fact and those paragraphs in the presentence report for which objection has not been offered. The Court notes the objections and believes that they can be addressed best as set forth in the responses been provided by the addendum to the presentence -- or addendum to those objections which addresses the presentence report as well.

There is one matter that the Court believes must be aired a little bit more firmly than that which has been brought to the Court's attention to date. That relates to the testimony of two witnesses. Two witnesses which indicate exactly the role of this

defendant without equivocation, and it was not reasonably rebutted during the course of the trial.

Looking at the number of witnesses which were called, the Court looks at that testimony which has been provided. And we

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have two witnesses who were reasonably clear, in fact totally clear on the role of this defendant, William Hendrickson, Dane County Sheriff's Department, as well as Dawn Johnson, Dane County Sheriff's Department. And each of them did indeed suggest to us very clearly that they recalled in the process of doing the search that the defendant walked into the bedroom with Detective Johnson and was directing them as to an area in the closet where the crack cocaine was.

Did he make further statements? Dawn Johnson says yeah. He said, referring to Sabrina, that she had nothing to do with this matter. And also Hurn said that he wanted to show Ms. Johnson where it all was. I asked him what are you referring to, and he said crack. And after he said let me show you where it's at and confirmed he meant crack, he then said that -- they headed towards the kitchen, he nodded his head at the kitchen. He was asked if he was referring to the kitchen and he said yes. Said where. He said in the drawer. At that point in time searching had not begun in the apartment.

You recall, that was at the very beginning. I don't know why she was called in the afternoon, at 2:50 in the afternoon. I suppose that, you know,

breaks up the continuity which is the idea. But the fact that she was a belated witness in the matter and she talked about those things that occurred before the search where defendant states, I went into -- he went in the kitchen with her and pulled down -- opened a couple of

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drawers. Talked to Mark at the dining room table. Specifically asked which drawer he was talking about. That's when he was more specific and told me to go to the drawer of the refrigerator. She went. What did she find? Recognized there was cocaine product there, the drawer was packaged up.

There was also the testimony of Detective Baker. Again, the drawers were brought to the investigators' attention by this defendant, either pointing to them, nodding at them or telling them what drawer. What did he say about money? He said we'd find it in his bedroom.

Did he say anything to you about those drugs were in the apartment? This is Dawn Johnson again. Several times. He told me they were all his. And the same for money? Yes, he said it was all his. A little more specifically now. At any point did you talk to him about the approximately 450 grams of crack that were recovered in that bedroom closet in the Nike box? There at the residence? Yes. Answer: Yes. What did he say? He specifically asked if we had found, and I don't remember the term that he used, whether he said drugs or cocaine or crack, but he wanted to know if we found the stuff in the Nike shoebox. At that point in time I did not know and I

went into the bedroom and asked officers are you finding something in the Nike shoebox and was advised that they had.

And Hurn then accompanied the witness around the apartment at about 20, 30 more minutes. He began talking and advising

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about the drugs. What did he do when you got in the master bedroom? He immediately -- several officers were in there because there was money being counted. He was making sure that they found it. Did you find this and even at one point looked into the closet and pointed out the Nike box was there and we indicated we had already found it. So it was just kind of reassuring us that we had found it all, whether it was money or drugs.

Now, again that's a brief statement as to the evidence that was provided to us. Finally, after he identified the drugs in the apartment and said they were his, I advised him he was under arrest and he was transported immediately to Dane County Jail.

Now there's no question that he had those drugs. He had control of those drugs. It was foreseeable to him that those drugs were going to be distributed. It was certainly his direction and supervision that kept this place going. He was the boss. He had the drugs, he knew where they all were and they were at his availability for his distribution thereof.

Now, how this changes. There was a time that began at the preliminary pretrial conference when

that admission was about to come in, at least it was thought that it shouldn't come in, and the fact is that this Court was of the opinion that what else could it be used for and the comments were, well, he's protecting somebody else, really it isn't his, or he's afraid.

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Now those are the speculative arguments which have been offered. The Court doesn't accept any one of them. This defendant knew exactly what he was doing and knew exactly where the drugs were and knew exactly what they were there for, and it wasn't out of fear.

There was a remark that he said, well, he said, and now they're going to kill me. Well, he could very well mean that 24 years that he was concerned about that he was also quarreling about. Maybe that'll kill him. But there's nothing to suggest that there was any threats ever made. There's nothing suggested that he wanted to protect anyone else except Sabrina.

Now that goes far beyond what you folks have brought to the Court's attention but you know it's in the record. And so you suggest, well, you know, you really shouldn't be considering relevant conduct. It's not kosher. The fact of the matter is don't know of any other reason why the Court would not when you have this type of an enterprise that is continuing and where the Court can determine and should determine and must determine if we're going to keep this a viable judiciary and a viable means by which we can be assured of the fact that the appropriate

result occurs, that the Court does consider it. Don't see the word relevant but I think you can gather from the Watts discussions that perhaps it could be not considered by a court and I don't doubt that a number of

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the judges don't consider relevant conduct either, no matter where it is. This Court does, it has in the past and it does believe that this is an appropriate time for it to also consider that and further discuss the concerns that the Court has in this matter.

Acceptance of responsibility. Now, this was an unusual response which the Court found from the defendant which it had to read over twice when it saw it. I believe it was in the September 11th memorandum at paragraph 7. If the Court is not -- Let's see. If the Court is inclined to consider the 452 grams of cocaine base in determining the sentencing guidelines, then Mr. Hurn should be entitled to a two-level reduction for acceptance of responsibility because he was acquitted of those charges. If the Court is not going to use the grams to calculate the sentencing guidelines, then we do not believe he should be entitled to acceptance of responsibility. If this Court is inclined to use the guidelines for the cocaine base, then it should give him a two-level reduction for acceptance of responsibility, for in addition to, under the application of Note 1(e), Mr. Hurn voluntarily assisted authorities in recovering the facts and instrumentalities of the offense. He showed them immediately where all the

money and all the cocaine would be found.

And the Court said, What was the sense of you, the judge, going through that litany of everything he did? Well, because

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he really did it but he's been trying to back away from those statements since this case began at the preliminary pretrial conference, and that's why he doesn't get acceptance of responsibility, getting to that one. There's no genuine remorse, understanding. He says, Oh, I did it. Well, he did it then. But the fact of the -- And we know he did it. We know that he did it without being told that, us told that, and it's a belated mea culpa, I suppose, and it just doesn't wash if you look at all of the elements that you need under the guidelines for the purposes of receiving acceptance of responsibility.

This is an admission which he had no other choice but to agree with and the fact that he did agree with it, either in the beginning or belatedly, it put the government to its proof. It did not in any event suggest that there was to be a guilty plea as a result thereof, and it's just draconian to believe that this very conduct that he is attempting to avoid throughout the entire trial is now to be given reward because his suggestion is, well, I told them where the stuff was. Doesn't seem right, does it? It seems unusual to do it that way, doesn't it?

MR. EISENBERG: I think --

THE COURT: We can -- Huh?

MR. EISENBERG: I didn't mean to interrupt you.

THE COURT: This in every case. Every time we find

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him guilty we said, well, you know, if I -- I never took the stand to deny it, I never made any points to say that it wasn't mine. The fact is that we know there are other elements involved and that does not give him acceptance of responsibility. You still had to run through the whole gamut to show, as it was shown, that this relevant conduct is evidentially based. And that's the reason that there is no relevant conduct being provided.

Looking at the fact that he did choose to go to trial with the powder cocaine certainly doesn't suggest that there would be any acceptance of responsibility. And here we're suggesting that the actions of the defendant based upon those admissions does not suggest to the Court that there is any reasonable basis upon which acceptance of responsibility can be provided.

I'm having some difficulty because so many reasons were offered as to why he did not have these drugs that it's difficult for me to put them all together. One of them was that he admitted to the police all the drugs were his at the time. The drugs -- and then that the drugs were not actually his, he should then be acquitted. They really were those other folks'. And either way it doesn't make any difference. There is the foreseeability. The fact is

that he was aware of their being present. He had control over them and was able to do with them. In fact, he said in one line, Gee, if they'd have got here one day earlier -- how did it -- one day later or one

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day earlier they wouldn't have found them here, indicating that they were going to be moved out within a reasonable period of time. The fact is that there was the movement and they would have shown up one day later they may have found an empty drug house.

Getting back then to the main event. Well, I don't think we have to do that. I think what we have to first do is give you the opportunity to further address the sentence to be imposed.

The Court does determine based upon the relevant conduct that the offense level is that of 34. The probation officer applied the advisory sentencing guidelines correctly using the November 2005 Guidelines Manual and the March 2006 supplement. Defendant made a broad acknowledgment to the investigators searching the apartment that all the drugs and cash were his. Told investigators there was crack cocaine in the residence during the search. Paragraph 58 of the presentence report sets out the defendant's prior crack cocaine distribution conviction.

The Court notes that the base offense level is 34 under Section 2D1.1(c)(3) because defendant's relevant conduct falls near the high end of the applicable drug quantity range of at least 3,000

kilograms but less than 10,000 kilograms of marijuana equivalent. So he's got a 24. Took his case to trial, was found guilty of possession with intent to distribute

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cocaine. The preponderance of the evidence indicates he also possessed with intent to distribute crack cocaine. He has not accepted responsibility for the offenses and no decrease for acceptance of responsibility is provided. The total offense level of 34 combined with Criminal History Category III results in a guideline imprisonment range of 168 to 235.

Before hearing your arguments as it relates to that sentence to be imposed, the Court does attempt to follow the Supreme Court in Watts but the Court addresses the preponderance of the evidence standard. And you know there are a couple of circuits that believe otherwise, and of course the door has been somewhat opened by the Supreme Court by saying that the cases that they had before it in Watts were not in any way extreme.

And the Court looks at the U.S. against Corbin in 998 F.2d 1377, Seventh Circuit '93. Finally, although we have concluded that no more exacting a burden on a preponderance of the evidence was required, we note that the district judge found that Corbin had committed aggravated assault by clear and convincing evidence and perhaps even beyond. Accordingly, if this situation could be characterized as an instance of the tail wagging the dog, Corbin enjoyed the benefit of an appropriate higher

evidentiary standard. Granted, the district court did not render a finding beyond a reasonable doubt but

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Corbin's innovation of this -- invocation of this standard really is a reprise of an argument that he may not be sentenced with reference to the aggravated assault guideline unless he has been convicted of the offense.

The court suggests that where there is perhaps an extreme that there would be a different standard which would be clear and convincing. Cases acknowledge that a higher burden of proof might sometimes be appropriate but do not embrace a standard as demanding as proof beyond a reasonable doubt.

That is Corbin which you're both familiar with and I haven't completed the discussion of Trujillo which is in the Seventh Circuit as well. They quote a Third Circuit opinion which the Court has difficulty in understanding. The Third Circuit found that in this extreme context, the court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations. And it held that in such circumstances the enhancement factors must be proven by clear and convincing evidence.

Now for whatever that means in the Third Circuit, it probably means there could be a time when clear and convincing is the appropriate standard rather than preponderance. And if you look at 33, which counsel for the defendant had

suggested if it were powder only, and you look at 235 which would be as a result of both -- that would be the high end of each guideline,

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that is a seven times' difference. The question for the Court is, is that extreme. Is that one where the Court cannot reflexively apply the truncated procedure that is perfectly adequate for all of the more mundane, familiar sentencing determinations.

The Court is of the opinion that whether you need that standard or not, this evidence is clear and convincing and it has been to the Court's mind from the time of trial and that the Court can't imagine that it requires anything further to be stated other than the Court having determined preponderance of the evidence. The more it goes through this case, the more it's of the opinion that clear and convincing is the appropriate standard in this case in this court as a result of the difference in the quantities which have arisen as a result of the relevant conduct as determined by the Court to exist.

Having said everything I suppose is not what either party expected to hear, the Court will attempt to close by concluding the -- addressing a combined sentencing recommendation. In determining the defendant's sentence the Court will consider the sentencing guidelines and the statutory purposes of sentencing set forth in 18 United States Code Section 3553(a). As stated before, the Probation Office applied the advisory sentencing guidelines correctly using the November 2005 Guidelines Manual and the March 2006 supplement.

We've talked about the defendant's acknowledgment. He

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told investigators there was crack cocaine in the residence during the search. The base offense level has been provided based upon the kilograms involved. He took his case to trial, was found guilty of possession of intent to distribute powder cocaine and the clear and convincing evidence indicates he also possessed with intent to distribute crack cocaine. I guess that's where I broke the mold and determined that the higher standard in this particular instance is appropriate. He has not accepted responsibility for that.

I previously have stated that and will now call upon counsel to address that term of imprisonment which may be appropriate during the -- for the range of 188 to 235, there being a criminal history category of III. Mr. Eisenberg.

MR. EISENBERG: Judge, before I do that I would like to make some comments about the transcript that you read, if that's okay.

THE COURT: Yeah.

MR. EISENBERG: First of all, you know, I have a problem with this burden of proof thing and I appreciate you finding that it was by a clear and convincing standard. But, you know, when a jury is sitting there in this circuit the jury doesn't even know what beyond a reasonable doubt means because there's no definition for it.

THE COURT: And there won't be.

MR. EISENBERG: I understand that. So we have this

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standard of beyond a reasonable doubt and we have the preponderance and we have the clear and convincing someplace in the middle, but we really don't know what the jury thought. We do know that it wasn't beyond a reasonable doubt and that's why he was acquitted, but to address burden of proof the way you did in this matter I don't think makes a lot of sense only because I don't think the jury is really aware of what the burden of proof and the different levels are anyway.

THE COURT: But the Court determines relevant conduct and that's what the Court is doing and it is accepting your invitation to use that standard.

MR. EISENBERG: And I respect that. I just wanted to make my point.

The parts that you read in that transcript I believe were from the direct examination of Dawn Johnson and I don't know if you looked at her cross. But obviously I did score some brownie points with the jury on the cross. And if you'll remember the cross, she came to him and said, We found powder cocaine in the Nike box, and he goes, Yeah, powder cocaine, and I think there were quotes around it in Dawn Johnson's report. I can't remember whether there were or not. But there was that issue at the hearing.

He also -- There was a small amount of crack found in the kitchen drawer and I suppose the jury ignored that. I think there was 20 grams of crack, I guess it's not a small amount

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but it's small compared to what was in the box. And the jury must have ignored that and said, well, I don't think he knew that there was the crack in the shoebox and that's why acquitted him. He was also not aware of the amount of money that was there or the amount of crack cocaine. If you remember, I think he said something like 10 ounces and there was almost double that. And he had no clue about how much money was there.

He talked about how nobody said -- he wasn't worried about retaliation or he talked about he might have been saying they're going to kill me for the 24 years he's looking at or whatever it was. But if you remember, also Sabrina testified and she asked -- as Dawn tried to get her to cooperate and she was worried about retaliation as well, and I can't remember if that came out at trial or not but I do know it was in one of the police reports and I do think it did come out at the trial.

I would ask that you sentence him at the bottom of the guideline range and I think part of this is the mental capacity and I addressed that in my letter to the Court. Clearly he knows right from wrong. I'm not saying that. An eight-year-old would know that. But in the same token I do not believe that he is the mastermind of this group, and I do believe it was a group, and the jury thought it was a

group because the jury believed Sabrina. Otherwise, they would have convicted him of everything.

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And for those reasons and based on his mental, I don't want to say incapacities, mental--what did I call it in here?

THE COURT: Deficiencies?

MR. EISENBERG: Ahh, let's see here. Limited mental capabilities. I think that is a reason to sentence him at the lower end of the guideline range and I'd ask you to do that. That's on the bottom of the second page of the letter from yesterday.

THE COURT: Mr. Hurn, do you have a statement that you'd like to make to the Court?

MR. EISENBERG: Judge, we talked about this and you can ask him directly, but we have decided based on appealable issues that he would not be making any statements.

THE COURT: All right.

MS. DUCHEMIN: Your Honor.

THE COURT: Ms. Duchemin.

MS. DUCHEMIN: The United States doesn't have a specific recommendation of where the Court should go within the range. That's at the Court's discretion. I think anywhere in the range is reasonable.

Mr. Eisenberg alluded to this issue of Mr. Hurn's mental capacity. I addressed this

somewhat in the sentencing memorandum that I submitted to the Court, but I think something that is very much of an aggravating factor here is that this is complete déjà vu from his last drug felony. In his last drug

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felony he's found with $3700 in cash in three different pockets and 50 separate baggies of crack cocaine. What does the defendant say? I was set up. I was holding it for someone. I'm the patsy. I'll know better next time. It's all my friend's. I won't get involved with the wrong friends.

And here we are again in the exact same situation. Mr. Hurn, after spending five years in prison I think it was, for that previous conduct, here we are again. Same thing. Gets caught with a huge quantity of drugs and cash and, you know, initially admits it and then changes his mind and decided he'd rather again blame someone else.

You know, this notion of his lack of mental capacity also gets to the transcripts that I provided to the Court of two jail tapes. The jury did not get to hear these tapes. I submitted the transcripts to the Court. I do have them prepared to play for the Court. I would ask to be allowed to play those for the Court because I think that they speak not only to the defendant's culpability but more so even to the defendant's demeanor, his ability to deal with people and his capacity for understanding what's happening to him. Your Honor, with permission may I play them? I think there may be a total of three minutes. They're not long at all.

THE COURT: Any objection?

MR. EISENBERG: No. He does want to say something. I apologize. But we could do that after she's done, unless you

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want to do it now.

THE COURT: Defendant, you now wish to make a speech?

DEFENDANT HURN: Yes. Yes, Your Honor.

THE COURT: All right.

DEFENDANT HURN: Stand up?

THE COURT: You may be seated.

DEFENDANT HURN: I'll be seated?

THE COURT: You may.

DEFENDANT HURN: Oh. I would like to know, to tell everybody in this courtroom that yes, on my first time I got locked up, yes, I was around the wrong people at the wrong time. Yes, I do took full responsibility of my actions. That's why I pleaded guilty to that. Now she says she playing tapes that involve me saying that I have activity to this case. I told her and I told her once and I told Dawn Johnson, when she came to me and told me informant said it was a .25 handgun in the house, they hit the apartment, when then they never brung the informant to trial, wasn't none of that true. I told her, stated that I feel my life is in a threat.

I pointed that out not 'cuz at the time that I felt I was taking, I -- in one of the statements in the tape I say I told the person who it was I'm willing to take 18 years. These people was willing to threaten me and I told her over and over again who it was. She tell me in a conference room that I believe you are a small player in this. Obviously she didn't

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want to bring that, present that to trial and she didn't ever want to present to the informant. That they said in this statement even from the government saying the informant wasn't reliable of this case.

She said my handprints was on the drugs and they wasn't. They ain't produced no handprints to say this is my drugs, 452 grams of crack. I will take full responsibility of my actions. I know you're going to give me what you're going to give me. I'm not mad at you. Why I'm saying I'm mad is 'cuz I told the truth. I'm not lying. I did tell the truth. I'm not mad at what you're going to give me. I'm not mad at the prosecutor. She doing her job. But what I told the prosecutor when she came and had a interview with my lawyer on the phone, I said I'm willing to cooperate. She say I know. She say I know you have a small play in this role, but she said Hurn could give us some information that's involved with in this town of Madison, we're willing to accept it. I told her that.

And all I have to say, Your Honor, that, you know, I'll take full, once again full responsibility of my actions. Yes, I was wrong on the first case in

1995. I bonded out. I sat on the street for 180 days. I got eight years and I set my, and I went to jail. And I get out of prison in five years and I've been on the street for four years with no police contact or nothing. Yes, I was tell the truth. This was mine. I got no other choice. But I told them my life was in threat. That's

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why I pointed to everything. I didn't know it was there. It was -- I told her -- she asked me how much money it was. I said 49,000. She asked me how many -- how much ounces it was, I said 10. And come to find it was more than that.

I don't have nothing indicate me stated, no cars, nothing in my name. No money, no ties. I got incarceration 2001 of March and been in society since then. So I appreciate it for letting me tell us about it.

THE COURT: Now you have something to bring before the Court, Ms. Duchemin?

MS. DUCHEMIN: Your Honor, I submitted the transcripts of --

THE COURT: I know that. You've said that.

MS. DUCHEMIN: Then I would like to play the tape.

THE COURT: Go.

(Tape played)

MS. DUCHEMIN: The next one is

shorter. It's just a portion --

THE COURT: No, that's enough.

MS. DUCHEMIN: Okay.

THE COURT: I think we've protracted this matter well beyond what needed to have been protracted but the Court I guess was a party to it and that's what happens.

The Court at this time does remind counsel of those uncontested facts which are in the presentence report. At

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paragraph 3, on June -- that relates to the amount of the offense conduct. Paragraph 8, on June 3, 2005 members of the Dane County Narcotics Task Force executed a search warrant at the residence of Mark Hurn and Sabrina Mays at Bahr Circle, Madison and recovered 450 grams of cocaine base, approximately 50 grams of powder cocaine, 25 Ecstasy pills, found a total of $38,921 in cash.

The Court also, now that we will be looking at the efficiency that may have occurred to the defendant, does also believe the previous sentence and comments offered by Circuit Judge Fiedler when addressing similar issues is appropriate to use at this point. At sentencing he said, Mr. Hurn, I realize you have had some inherent difficulties in your life that are beyond your control, by that I mean the fact that you are developmentally disabled. That came through very clearly in the presentence investigation report. I have no reason to doubt that this is the

case as evidenced by the fact that you were in special education classes, et cetera, that you currently receive SSI benefits for the same. I'm satisfied that you are of sufficient mental ability to know that dealing in drugs is wrong and that people who do so are going to be punished, oftentimes punished harshly, because this is something that society is simply not going to tolerate. Regardless of your degree of educability, I am further satisfied that that you are aware that someone holding 50 or

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approximately 50 packaged pieces of crack cocaine and having on their persons three separate wads of money which totaled up to $3700 is someone who is involved in the drug trade, even assuming everything your attorney indicates is accurate. Anyone who even for purposes of holding the drugs and money for another is involved to that extent is knowingly and willingly involved with the drug trade no matter what your reasons for being there may be. And I'm satisfied, as I sit here today, that you were in this with your eyes open, that you knew the potential penalties you faced.

You were fully aware of this crime. You went to trial and the Court has determined the relevant conduct which has occurred here, knows you knew of it and believes that it's certainly matters which must be considered. It was considered by Judge Fiedler. I would say to you that you've been told that before. You've been told it by this Court and now we have to fashion a sentence, a sentence which would somehow deter you from your continued criminal activity.

You have a history of alcohol and drug abuse. The drug quantities here fall near the top of the drug quantity range for your offense level. The present offense is remarkably similar to the 1996 crack distribution case that you had before Judge Fielder. It's a rerun where he admonished you and addressed the issue of diminished capacity. Even back then the court took note that you had been making a living as a drug

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dealer and despite your cognitive disabilities you successfully amassed large sums of money. We do not entirely discount your intellectual impairments as a factor. It does mitigate the crime. But nonetheless, you were in there with your eyes wide open and it is now time for sentencing.

The Court does believe that a sentence near the high end of the advisory guideline range is necessary to satisfy the statutory purposes of sentencing which in this case is to hold you accountable for your criminal conduct, protect the community from further victimization, and provide you with the opportunity to participate in needed substance abuse treatment with vocational training and to attempt to avoid your continued dealing in drugs once you are released. As a recidivist, the next time around it'll probably be much more substantial than it was today.

And the fact is that as to Count 2 it is adjudged that you are committed to the custody of the Bureau of Prisons for a term of 210 months. The Court recommends that you take the opportunity to

participate in substance abuse treatment and vocational training while confined and that you receive a prerelease placement in a residential reentry center with work release privileges but without home confinement.

The term of imprisonment is to be followed by a three-year term of supervised release. As special conditions of supervised release, the defendant is to: provide the supervising United

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States probation officer any and all requested financial information; register with local law enforcement agencies and the State Attorney General as directed by the supervising United States probation officer; submit his person, residence, office or vehicle to a search conducted by a United States probation officer at a reasonable time and in a reasonable manner whenever the probation officer has reasonable suspicion of contraband or of the violation of a condition of release. Failure to submit to any such search may be a ground for revocation. You shall warn other persons that your premises, premises you're occupying are the subject of searches pursuant to this condition.

You are to abstain from the use of illegal drugs, from associations with drug users and sellers and participate in substance abuse treatment. You shall submit to drug testing beginning within 15 days of your release and 60 drug tests annually thereafter. The Probation Office may utilize the Administrative Office of the United States Courts phased collection process. And, you are to pay child support in

accordance with any applicable court order.

It's adjudged that you pay a $100 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing. You have neither the means nor the earning potential to pay a fine without impairing your ability to support yourself and your dependents

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upon release.

DEFENDANT HURN: Excuse me, Your Honor. Do I have to pay that fine now?

THE COURT: You --

DEFENDANT HURN: Or do I pay --

THE COURT: Your lawyer will discuss that with you.

DEFENDANT HURN: All right.

THE COURT: The order is outstanding which means that it is due and payable at this time, yes, sir.

DEFENDANT HURN: I don't understand.

THE COURT: I understand that.

MR. EISENBERG: I'll take care of it.

THE COURT: It is due and payable at this time.

The Court then having announced the sentence which it believes necessary and appropriate to impose

now calls upon counsel for those reasons not cumulative of those already offered as to why the sentence as announced should not be imposed. Mr. Eisenberg.

MR. EISENBERG: I have nothing else, Judge.

MS. DUCHEMIN: Nothing else, Your Honor.

THE COURT: The Court then does impose that sentence as previously announced.

And the Court, if indeed suggested that this defendant knew what each package weighed and what every drug was valued at and what every -- what the amount was, because he perhaps didn't

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know all of that, that does not excuse the fact that it was foreseeable based upon those circumstances which existed at the time and that he knew of the controlled substance which was in the place. It was his place and regardless of the critique offered by Mr. Eisenberg, facts are as stated by the Court.

I think we'll -- I'll tell you what we'll do. When you come back the next time I'll give you more time to have a conference and we'll address your next --

DEFENDANT HURN: My appeal.

THE COURT: All right. We'll stand adjourned.

(Proceedings concluded at 2:52 p.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____

11/10/06

[37]

Susan Barsness
Date

Certified Transcriptionist

[38]

No. 07-605

In the Supreme Court of the United States

MARK HURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

No. 07-605

MARK HURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioner contends (Pet. 7-18) that his Sixth Amendment rights were violated because the district court, in determining his sentence, relied in part on conduct underlying charges on which the jury had returned a verdict of not guilty. This Court has recently received several other petitions for writs of certiorari raising the same or similar claims. As the government has explained in briefs in opposition to those petitions, the acquitted conduct issue does not warrant this Court's review. See, *e.g.*, Gov't Br. in Opp. at 8-13, *Mercado* v. *United States*, petition for cert. pending, No. 07-5810 (filed Nov. 30, 2007) (available at 2007 WL 4348939); Gov't Br. in Opp. at 7-13, *Ashworth* v. *United States*,

petition for cert. pending, No. 07-8076 (filed Feb. 8, 2008).[1]

In *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles rather than the Sixth Amendment, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *ibid.* That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines put in place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Since *Booker*, every court of appeals has held that a district court may consider acquitted conduct at sentencing. See *United States* v. *Jimenez*, No. 05-4098, 2008 WL 115206, at *20 (3d Cir. Jan. 14, 2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409 (4th Cir. 2007), petition for cert. pending, No. 07-8076 (filed Dec. 5, 2007); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir.), petition for cert. pending, No. 07-605 (filed Nov. 1, 2007); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir.), petition for cert. pending, No. 07-5810 (filed Aug. 8, 2007); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502

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[1] We have served petitioner with a copy of the government's brief in opposition in *Ashworth*.

(2007); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).[2]

This Court has repeatedly denied petitions for writs of certiorari raising the issue. See, *e.g.*, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007); *Dorcely* v. *United States*, 127 S. Ct. 691 (2006); *Armstrong* v. *United States*, 127 S. Ct. 109 (2006); *Lynch* v. *United States*, 127 S. Ct. 89 (2006); *Magluta* v. *United States*, 126 S. Ct. 2966 (2006). There is no reason for a different result here. Nevertheless, to the extent that this Court is holding petitions raising this issue for further consideration, it would be appropriate to accord similar treatment to the petition in this case.

2. Petitioner additionally contends (Pet. 18-22) that his sentence was unreasonable under 18 U.S.C. 3553(a) because it was based in part on acquitted conduct and purportedly failed to account properly for petitioner's

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[2] After the Sixth Circuit in *Mendez* upheld a district court's consideration of acquitted conduct at sentencing, a panel of the Sixth Circuit in *United States* v. *White*, 503 F.3d 487 (6th Cir. 2007), issued an opinion adhering to the *Mendez* ruling but suggesting that the defendant file a petition for rehearing en banc on the question whether the continuing use of acquitted conduct as a sentencing enhancement violates *United States* v. *Booker*. On November 30, 2007, the Sixth Circuit withdrew the panel opinion in *White* and granted rehearing en banc. The *Mendez* ruling, however, remains in effect in the Sixth Circuit. Moreover, because the en banc court in *White* may uphold the *Mendez* ruling, this Court's review would be premature at this time.

limited mental capacity. Neither claim merits review. Petitioner did not raise the argument that the district court's consideration of acquitted conduct rendered his sentence unreasonable in either the district court or the court of appeals. See Pet. C.A. Br. 13-17; Pet. C.A. Reply Br. 2-4. Nor did the court of appeals address that argument. For that reason, it is not properly presented here. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). In any event, the courts of appeals have correctly and repeatedly rejected similar contentions. See 18 U.S.C. 3661.[3] There likewise is no need for further review of petitioner's fact-bound claim that his diminished mental capacity rendered his sentence unreasonable. As the court of appeals explained, the district court "reasonably concluded that, despite [petitioner's] low I.Q., he knew that he was engaging in serious criminal activity and that—given the prior conviction for the same offense—a Guidelines range sentence was necessary to deter him from further criminal behavior." Pet. App. A14. The district court did not abuse its discretion in weighing the factors under 18 U.S.C. 3553(a). See *Gall* v. *United States*, 128 S. Ct. 586, 597-598 (2007).

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[3] See, *e.g.*, *United States* v. *Dawkins*, 240 Fed. Appx. 598, 599 (4th Cir.), cert. denied, 128 S. Ct. 632 (2007); *United States* v. *Four Pillars Enter. Co.*, No. 06-3297, 2007 WL 3244034, at *4-*5 (6th Cir. Oct. 30, 2007) (unpublished); *United States* v. *Fazio*, 487 F.3d 646, 659-660 (8th Cir.), cert. denied, 128 S. Ct. 523 (2007); *United States* v. *Demeulenaere*, 205 Fed. Appx. 685, 687 (10th Cir. 2006), cert. denied, 127 S. Ct. 1340 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 375-376 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

FEBRUARY 2008

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(3)

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SUPREME COURT, U.S.

No. 07-605

IN THE
SUPREME COURT OF THE UNITED STATES

MARK HURN
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (8th ed. 2002) 5

REPLY BRIEF

The Government argues in its Opposition (Opp.) that "the clear import of the Court's decision" in *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) "is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution." Opp. 2. The Government states that "the acquitted conduct issue does not warrant this Court's review," citing its arguments in earlier briefs in *Mercado* v. *United States*, petition for cert. pending, No. 07-5810 (filed Nov. 30, 2007) and *Ashworth* v. *United States*, petition for cert. pending, No. 07-8076 (filed Feb. 8, 2008). The Government states further that "every court of appeals has held that a district court may consider acquitted conduct at sentencing."

The Government also argues that Petitioner's contention that his sentence was unreasonable under 18 U.S.C. § 3553(a) is not properly before this Court, but that "courts of appeals have correctly and repeatedly rejected similar contentions." Opp. 3-4.

None of these arguments is persuasive, nor directly addresses the issues raised by Hurn's Petition, and this Court should grant review.

First, this Court's recent Sixth Amendment decisions reveal that heavy reliance on acquitted conduct to justify an extreme sentence enhancement must be ruled unconstitutional in light of the inviolate right to a jury trial under the Sixth

Amendment. As this Court has held, "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge." *Cunningham* v. *California*, 127 S. Ct. 856, 863-64 (2007); *United States* v. *Booker*, 543 U.S. 220, 227-28 (2005). In the case below, Hurn's sentence of 210 months was based "almost entirely" upon acquitted conduct, as the jury considered and rejected the prosecution's accusation at trial that Hurn should be held criminally responsible for distribution of crack cocaine.

Second, this matter is properly before the Court. In the courts below, Hurn argued that his sentence based "almost entirely" on acquitted conduct was unreasonable under 18 U.S.C. § 3553(a). Pet. C.A. Br. 12-15. Hurn presented and the lower courts considered arguments on both the unconstitutionality of his sentence based on acquitted conduct and its unreasonableness under Section 3553(a). *Id.* It is consequently appropriate for this Court to grant review.

For these reasons, this case warrants immediate review by the Court, because it presents the critically important and recurring issue of whether federal courts may rely upon acquitted conduct to justify the legality of a criminal sentence under the Sixth Amendment. Indeed, as acknowledged by the Government, "to the extent that this Court is holding petitions raising this [acquitted conduct] issue for further consideration, it would be appropriate to accord similar treatment to the petition in this case." Opp. 3. The Government also concedes that the Sixth Circuit recently granted a

rehearing en banc on this precise issue after a panel independently raised the need for review. See Opp. 3; *United States* v. *White*, 503 F.3d 487 (6th Cir. 2007).

I. REVIEW IS NECESSARY TO RECONCILE THIS COURT'S SIXTH AMENDMENT RULINGS WITH ITS EARLIER DECISION IN *WATTS*.

A decade ago, this Court held that the consideration of some acquitted conduct does not necessarily violate the Double Jeopardy Clause of the Fifth Amendment. *Watts*, 519 U.S. at 148. *Watts* addressed only "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Id.* at 240 n.4. Importantly, the argument raised by this Petition—that the consideration of acquitted conduct during sentencing violates the Sixth Amendment—"simply was not presented" in *Watts*.

Moreover, in the decade since *Watts*, this Court has repeatedly stressed the constitutional significance of the Sixth Amendment, creating an obvious tension with its earlier, limited ruling on Fifth Amendment grounds. See Pet. 14 (citing cases). This obvious tension has repeatedly been identified by a host of lower courts (Pet. at 15-17), highlighting the need for guidance from this Court. Indeed, as the Government acknowledges, the Sixth Circuit recently granted a rehearing en banc on this

precise issue after a panel independently raised the need for review. See Opp. 3; *White*, 503 F.3d 487.

The Government wholly fails to address any limitations on the scope or restrictions of *Watts*, arguing simply that that its "clear import" is that "sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution." The Government also cites its earlier arguments in other briefs in opposition to certiorari on this issue. None of these arguments responds to the basic premise that *this Court* is the only entity which can reconcile its Fifth Amendment decision in *Watts* with its recent Sixth Amendment decisions.

This Court has previously presented hypotheticals of particular sentences based on acquitted conduct which would likely *not* pass constitutional muster. For example, the Court distinguished between a permissible sentence of "months and years of imprisonment" and one which was transformed to "decades" in prison "on the basis of judgefound facts." *Rita* v. *United States*, 127 S. Ct. 2456, 2479 n.4 (2007) (Scalia, J., concurring in part and concurring in judgment). Similarly, the Court noted that "the door . . . remains open for a defendant to demonstrate that his sentence . . . would not have been upheld but for the existence of a fact found by the sentencing judge and not the jury." *Gall* v. *United States,* No. 06-7949, slip op. at 1 (U.S. Dec. 10, 2007) (Scalia, J., concurring).

This case *is* that hypothetical. Hurn's jury verdict authorized a maximum sentence of 33

months, yet the district court, relying "almost entirely" on the acquitted crack cocaine distribution charge, sentenced him to 210 months in prison. This 530% increase in sentence is precisely the outlier case to which this Court has previously alluded, increasing the sentence by fifteen years on the basis of judgefound facts. Absent the district court's heavy reliance on acquitted conduct, it could not have imposed a 210-month sentence, 177 months longer than the advisory Guidelines sentence which was supported by facts actually found by the jury. Worse, this sentence enhancement was based on conduct expressly *rejected* by the jury verdict.

The Government argues that the Court should deny certiorari because it has previously denied such petitions. Opp. 3. It is well settled, however, that the denial of certiorari has no precedential value, nor does it express this Court's view on the merits of the question presented. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J.); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 306 & n.66 (8th ed. 2002) (collecting cases); see also *Mercado* Pet. 9-10.

Nor are the five cases cited by the Government on point, because—unlike this case—none provided this Court with an appropriate vehicle for resolving the question of acquitted conduct during sentencing. Opp. 3. In two of the cases, no Sixth Amendment challenge was raised in the circuit courts. *Lynch* v. *United States*, 437 F.3d 902, 915-16 (9th Cir.) (en banc), *cert. denied*, 127 S. Ct. 89 (2006); *Magluta* v. *United States*, 126 S. Ct. 2966 (2006) (No. 05-952).

In the third case, the petitioner *had not been acquitted* of the conduct forming the basis for the contested sentence enhancement. *United States* v. *Armstrong*, 165 F. App'x 768, 770 (11th Cir.), *cert. denied*, 127 S. Ct. 109 (2006). The final two cases involved relatively minor sentence enhancements, and thus did not meet the test elucidated in *Rita* of transforming a sentence of "months and years of imprisonment to decades." *Rita*, 127 S. Ct. at 2479 n.4 (Scalia, J., concurring in part and in judgment); see Petition for Certiorari 6-7 & n.1, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007) (No. 06-8430) (consideration of acquitted conduct resulted in a one-month sentence enhancement); Petition for Certiorari 2-3, *Dorcely* v. *United States*, 127 S. Ct. 691 (2006) (No. 06-547) (consideration of acquitted conduct resulted in an eighteen-month sentence enhancement).

Hurn's sentence and its bases stand in stark contrast to these cases. Review is consequently appropriate.

II. REVIEW IS NECESSARY TO CLARIFY WHETHER A SENTENCE RELYING "ALMOST ENTIRELY" ON ACQUITTED CONDUCT IS REASONABLE UNDER 18 U.S.C. § 3553(a).

In addition to the weighty Sixth Amendment concerns outlined in the Petition, Hurn's 210-month sentence was also unreasonable under 18 U.S.C. § 3553(a), as the district court used Hurn's conviction on possession and intent to distribute powder cocaine

to sentence him as if he had been convicted of the crack cocaine charges the jury had just rejected.

The Government argues that this issue is not properly before the Court and also that lower courts have rejected the argument that consideration of acquitted conduct during sentencing is unreasonable under 18 U.S.C. 3553(a). Neither proposition counsels against this Court's review.

First, the Government's argument that the issue was not raised below exalts form over substance. Hurn argued that his sentence based "almost entirely" on acquitted conduct was unreasonable under 18 U.S.C. § 3553(a). Pet. C.A. Br. 12-15. The Government cites this Court's decision in *United States* v. *Williams*, 504 U.S. 36, 41 (1992) in support of its argument that Hurn's unreasonableness argument "is not properly presented here." Opp. 4. In *Williams*, however, this Court expressly held that:

> It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.

Williams, 504 U.S. 36 at 41-42 (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991)). Here, Hurn presented and the lower courts considered arguments on both the

unconstitutionality of his sentence based on acquitted conduct and its unreasonableness under Section 3553(a). See Pet. C.A. Br. 12-15. Under any construction of Hurn's arguments, the lower courts "passed on the issue presented," and there cannot be serious dispute that this issue is "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." See Pet. 14-15, 18.

The Government also states that "courts of appeals have correctly and repeatedly rejected similar contentions." Opp. 4. The fact that lower courts have rejected such reasonableness challenges under Section 3553(a) of sentences based on acquitted conduct is unsurprising, given this Court's decision on Fifth Amendment grounds in *Watts*. It is similarly unsurprising that, given this Court's recent Sixth Amendment decisions, lower courts *also* have noted that heavy reliance on acquitted conduct is unreasonable under 18 U.S.C. § 3553(a), as it necessarily promotes disrespect for the law and sentencing. See, e.g., *United States v. Coleman*, 370 F.Supp.2d 661, 671 n.14 (S.D. Ohio 2005); *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring). This apparent conflict between *Watts* and this Court's more recent decisions counsels *in favor* of this Court's review.

Additionally, Hurn's mental infirmities—acknowledged by both lower courts—underscore the unreasonableness of his sentence, and the corresponding importance of this Court's review. Although acknowledging that Hurn's low IQ "does

mitigate the crime," the district court still deliberately sentenced Hurn "near the high end" of the Guidelines range. App. C35: App. A9. The result was an imposed sentence almost 530% higher than Hurn's conviction for powder cocaine authorized without additional fact-finding.

Even if the Sixth Amendment permits the consideration of *certain* acquitted conduct under *certain* circumstances, there must remain statutory, constitutional, and policy-driven limitations. This Court should grant review to allow it to sketch more completely the outliers and boundaries of reasonableness review of acquitted conduct-based sentencing.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted this 4th day of March, 2008.

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